UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Ms. Cheryl E. Bradley
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Oklahoma Department of Environmental Quality
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JAN 14 2016

Dear Ms. Bradley:

Thank you for the opportunity to comment on the proposed revisions to Oklahoma's Air Pollution Control Rules, Oklahoma Administrative Code (OAC) 252:100, Subchapter 9 - Excess Emissions Reporting Requirements. As stated in our prior comments, dated October 8, 2015, the EPA appreciates the continued efforts and leadership demonstrated by the Air Quality Division to address issues related to excess emissions and raised by our June 12, 2015 State Implementation Plan (SIP) Call.

The SIP Call identifies issues in the currently EPA-approved SIP which contains rules adopted by ODEQ in 1994, and approved by EPA in 1999. See OAC 252:100-9-1 through 9-6, approved by EPA on November 3, 1999 (64 FR 59629). Specifically, the SIP Call required that the Oklahoma SIP be revised to remove exemptions and director discretion for excess emissions contained in these rules. So, as an initial matter, the State must submit a SIP revision to EPA withdrawing the 1994 version of the rules currently part of the Oklahoma SIP. See 64 FR 59629 (November 3, 1999) concerning OAC 252:100-9-1 through 9-6.

We recognize that the rules in the approved SIP do not reflect the rules currently in place as a matter of State law. In 2010 Oklahoma adopted rules that provide for an affirmative defense for periods of Startup, Shutdown, and Malfunction (SSM). These rule revisions were submitted to EPA, but later withdrawn at EPA's recommendation to allow the SIP Call to be completed and the final requirements to be clarified. With the finalization of the SIP Call, on June 12, 2015, it became clear that EPA would not be able to approve into the SIP provisions providing an affirmative defense to civil penalties for excess emissions. We understand that the State's current rulemaking is intended to address these concerns and provide a revision to the SIP that would conform to the SIP call.

The most recent draft proposed changes to the Oklahoma rules at OAC 252:100-9-8 Mitigation make very clear that these provisions are restricted to State enforcement proceedings by stating in OAC 252:100-9-8(b) that the rules apply to actions "*initiated by the Department*" and stating in OAC 252:100-9-8(e) that the rules "*shall not be construed to preclude EPA or federal court jurisdiction under Section 113 of the Act to assess Civil Penalties or other forms of relief for periods of excess emissions . . . .*" As such, OAC 252:100-9-8 appears to be a "state-only" requirement describing how the State intends to operate its enforcement program. By its terms, it does not appear to affect enforcement by other parties including EPA. Nevertheless, state-only provisions should not be submitted as a revision to the SIP. We continue to believe that an

approach of maintaining the Subchapter 9 SSM provisions as a matter of State law, outside of the SIP, would be consistent with CAA requirements, and consistent with the EPA's guidance in the SSM Policy. Indeed, the EPA specifically addressed this potential approach in the SSM SIP Call. See 80 FR at 33855-56. I will point out that, as noted in the SSM SIP Call, such state-only provisions, even though outside the SIP, should not be worded in a way that would preclude enforcement by the state for violations of CAA requirements. However, our preliminary assessment is that the proposed mitigating factor provisions would not raise this concern.

While we are recommending that OAC 252:100, Subchapter 9 remain outside of the SIP, we reiterate that it is still incumbent upon the State to submit a SIP revision to EPA withdrawing the 1994 version of the rules which are currently part of the Oklahoma SIP. See 64 FR 59629 (November 3, 1999) concerning OAC 252:100-9-1 through 9-6.

We appreciate the opportunity to review and comment on the proposed rules prior to the public hearing currently scheduled for January 20, 2016. We have provided specific comments on the rules in the enclosure. Again we appreciate your efforts to address excess emissions and the SSM SIP Call. If you have any questions regarding these comments, please feel free to contact me.

Sincerely yours,

Guy Donaldson
Chief
Air Planning Section

Enclosures (2)

- Comments on Proposed Subchapter 9 Revisions
- Regulatory Text of Proposed Subchapter 9 Revisions

ENCLOSURE
COMMENTS ON PROPOSED SUBCHAPTER 9 REVISIONS

Below we offer comments and recommendations on the proposed rule revisions:

1. The EPA continues to support the existing notification and reporting provisions of OAC 252:100-9-7 found in the current State-adopted rule.

2. Again, we do not believe the provisions of OAC 252:100 Subchapter 9 should be submitted for approval into the Oklahoma SIP. Specifically, EPA does not support inclusion of OAC 252:100-9-8(b) and OAC 252:100-9-8(c) as proposed because they are intended to pertain only to state enforcement actions. As a matter of state law, the EPA supports OAC 252:100-9-8(d) as proposed, because it specifically identifies the circumstances where affording potential mitigation is not appropriate and therefore prohibited.

3. The EPA supports the OAC 252:100-9-8(e) as proposed, because it clearly states that OAC 252:100-9-8 does not affect or alter the jurisdiction provided to the EPA and the courts under Section 113 of the Clean Air Act, or the citizen suit provision in Section 304 of the Clean Air Act. Even though it is not necessary to provide such a statement in a state-only provision such as this, we believe that this is helpful so the sources are aware that these mitigation factors do not apply to EPA, the courts, and citizen suits.

4. The EPA supports removing the reference to specific Subchapters in OAC 252:100-9-8(c) as these provisions may be revised in the future or their approval status may vary. The EPA understands the potential need to establish alternative emission limitations for periods of startup and shutdown, as contemplated in OAC 252:100-9-8(c), for facilities where it is not feasible to meet the otherwise applicable permit emission limits during these time periods. These alternative emission limits should be properly developed, narrowly tailored, federally enforceable, and consistent with all Clean Air Act requirements. We ask ODEQ to confirm for the record that alternative emissions limitations can only revise applicable permit limits, and not supplant applicable existing SIP approved provisions. It may be helpful to explore ways to clarify this in the rule itself.

5. The EPA believes it is important that alternative emissions limitations be federally enforceable. That is, alternative emissions limitations should be developed from a federally approved mechanism, so that there is no difference between the State and federal requirements.

6. Even though we do not believe the provisions of OAC 252:100 Subchapter 9 should be submitted as a part of the SIP, if they are, the regulatory text of OAC 252:100-9-8(b) and OAC 252:100-9-8(c), as proposed, should clearly state that any "*request*" for relief can be denied by the Department, in order to help reduce any confusion regarding whether these provisions continue to provide affirmative defenses. In addition, we request that the

supporting record for the adoption of these Subchapter 9 provisions clearly state that they do not affect the State's ability to seek penalties in court for excess emission violations, and that even if an owner or operator of a facility establishes that it meets all the mitigating factors in the Subchapter 9 provisions, they are not thereby entitled to such relief, and that the Department could nonetheless decide to seek and assess an administrative penalty for excess emission violations. The EPA believes Oklahoma must maintain these capabilities in order to meet Clean Air Act Title I enforcement requirements for SIPs as well as the Title V enforcement requirements. See, e.g., 40 CFR 70.11(a).

TITLE 252. DEPARTMENT OF ENVIRONMENTAL QUALITY
CHAPTER 100. AIR POLLUTION CONTROL

SUBCHAPTER 9. EXCESS EMISSION REPORTING REQUIREMENTS

252:100-9-1. Purpose [AMENDED]

This subchapter sets forth requirements for the reporting of excess emissions and establishes ~~affirmative defense provisions~~ mitigating factors for facility owners and operators requesting relief in an administrative penalty action brought by the Department for periods of excess emissions.

252:100-9-1.1. Applicability [AMENDED]

This subchapter applies to the owners and operators of air contaminant sources that are subject to emission limitations in OAC 252:100, an enforceable permit, an administrative order or a judicial order. Fugitive VOC emissions covered by an existing leak detection and repair (LDAR) program that is required by a federal or state regulation should be reported in accordance with the applicable LDAR program.

252:100-9-2. Definitions [AMENDED]

The following words and terms, when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise:

"Bypass" means intentionally avoiding the use of air pollution control equipment.

"Excess emissions" means the emission of regulated air pollutants or opacity in excess of an applicable limitation or requirement as specified in the applicable rule(s), enforceable permit, administrative order or judicial order. ~~This term does not include fugitive VOC emissions covered by an existing leak detection and repair program that is required by a federal or state regulation.~~

"Excess emission episode" means a continuous period of excess emissions occurring from one emission unit.

"Excess emission event" means the period of time during which excess emissions occurred, either continuously or intermittently, as a result of the same primary cause. An excess emission event may include one or more excess emission episodes.

"Primary cause" means the fundamental aspect of the cause that can logically be identified. In the event of a series of causes, one leading to another, the fundamental cause is the primary cause.

"Working day" means 8:00 a.m. to 4:30 p.m. each day except Saturday, Sunday, or a legal holiday for state employees as proclaimed by the Governor.

252:100-9-8. ~~Affirmative defenses~~ Mitigation [AMENDED]

(a) **General.** All periods of excess emissions regardless of cause are violations of the Act and rules promulgated thereunder, the Oklahoma Clean Air Act and rules promulgated thereunder, and applicable permit or other authorization of the DEQ. ~~An affirmative defense is provided to owners and operators for civil or administrative penalty actions for excess emissions during periods of startup, shutdown and malfunction.~~

(b) **Mitigating factors ~~Affirmative defenses~~ for excess emissions during malfunctions.** To establish that an incident of excess emissions resulted from malfunction ~~the affirmative defense~~ and request to be relieved of ~~a civil or~~ an administrative penalty in any action initiated by the Department to enforce an applicable requirement, the owner or operator of the facility must meet the requirements of OAC 252:100-9-7 and establish by a preponderance of the evidence:

(1) The excess emissions were caused by a sudden and not reasonably preventable breakdown of air pollution control equipment or process equipment, or the failure of a process to operate in the normal or usual manner.

(2) The excess emissions did not stem from any activity or event that could have been planned for or reasonably foreseen and avoided.

(3) Repairs were made as expeditiously as possible.

(4) The amount and duration of the excess emissions, including any bypass, were minimized to the extent practicable during periods of such emissions.

(5) Reasonable steps were taken to minimize the impact of the excess emissions on ambient air quality.

(6) The reason(s) any monitoring systems were not kept in operation, if applicable.

(7) The owner or operator's actions during the period of excess emissions were documented by contemporaneous operating logs or other relevant evidence.

(8) The excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance.

(9) To the maximum extent practicable, the air pollution control equipment or process equipment was maintained and operated in a manner consistent with good practice for minimizing emissions; provided, however, that this provision shall not be construed to automatically require the shutdown of process equipment to minimize emissions.

(c) ~~**Affirmative defenses**~~ **Alternative emission limits, and mitigating factors for excess emissions during startup and shutdown.** Emissions in compliance with a federally enforceable alternative emission limit or means of compliance developed for inclusion in the facility's permit for periods of startup and shutdown shall not be considered excess emissions. Under applicable permitting provisions of this chapter, any such alternative provision may not establish an emission limitation less stringent than an applicable emission limitation in the EPA-approved state implementation plan. To ~~establish the affirmative defense and to be relieved of a civil or~~ request relief from an administrative penalty in any action initiated by the Department to enforce an applicable requirement during periods of startup and shutdown, the owner or operator

of the facility must meet the requirements of OAC 252:100-9-7 and establish by a preponderance of the evidence:

(1) The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through reasonable planning and design.

(2) The excess emissions were not part of a recurring pattern indicative of inadequate operation or maintenance.

(3) If the excess emissions were caused by a bypass, the bypass was unavoidable to prevent loss of life, personal injury or severe property damage.

(4) The frequency and duration of operation in startup and shutdown periods were minimized to the extent practicable.

(5) Reasonable steps were taken to minimize the impact of excess emissions on ambient air quality.

(6) The reason(s) any monitoring systems were not kept in operation, if applicable.

(7) The owner or operator's actions during the period of excess emissions were documented by contemporaneous operating logs or other relevant evidence.

(8) The facility was operated in a manner consistent with good practice for minimizing emissions; provided, however, that this provision shall not be construed to require the use or installation of additional or redundant pollution control equipment not otherwise required and that this provision shall not be construed to automatically require the shutdown of process equipment to minimize emissions.

(d) ~~**Affirmative defenses prohibited**~~ **Prohibited relief.** ~~The affirmative defense~~ Any relief allowed under the provisions of this section shall not be available for:

(1) Claims for injunctive relief.

(2) SIP limits or permit limits that have been set taking into account potential emissions during startup and shutdown, including, but not limited to, limits that indicate they apply during startup and shutdown, and limits that explicitly indicate they apply at all times or without exception.

(3) Excess emissions that cause an exceedance of the NAAQS or PSD increments.

(4) Failure to meet federally promulgated emission limits, including, but not limited to, 40 CFR Parts 60, 61 and 63.

(5) Violations of requirements that derive from 40 CFR Parts 60, 61 and 63.

(e) ~~**Affirmative defense**~~ **Mitigation determination.** In making any determination whether to grant administrative penalty relief to a source ~~established an affirmative defense~~ under this section, the Director shall consider the information within the notification required in OAC 252:100-9-7 and any other information the Director deems necessary and relevant, which may include, but is not limited to, physical inspection of the facility and review of documentation pertaining to the maintenance and operation of emission units and air pollution control equipment. This section ~~should~~ shall not be construed ~~as limiting~~ to preclude EPA or ~~citizens' authority under the Act~~ federal court jurisdiction under Section 113 of the Act to assess civil

penalties or other forms of relief for periods of excess emissions, to prevent EPA or the courts from considering the statutory factors for the assessment of civil penalties under Section 113, or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of Section 304 of the Act.